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No. 1222

IN THE

Supreme Court of the United States

OCTOBER TERM 1966

GARY AIRCRAFT CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Gary Aircraft Corporation[1] petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in the instant case on November 8, 1966.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 368 F.2d 223.[2] The Decision

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[1] Hereinafter called Petitioner.

[2] The opinion, judgment, decree and order denying petition for rehearing are reproduced in Appendix A, *infra*.

and Order of the National Labor Relations Board[3] is reported at 151 N.L.R.B. 7.[4]

JURISDICTION

The opinion and judgment of the Court below was entered on November 8, 1966, and a decree was entered on November 30, 1966. On December 20, 1966, a petition for rehearing was filed. On January 4, 1967, the petition for rehearing was denied.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the Court below and of the Board rested on 29 U.S.C. § 160.

QUESTIONS PRESENTED

I. Did the Court below err in concluding that leadmen Phillips and Coleman were supervisors within the meaning of § 2(11) of the National Labor Relations Act, as amended,[5] (29 U.S.C. § 152 (11))?

II. Did the Court below err in basing findings that Petitioner violated § 8(a)(1) and (3) of the Act by relying on hearsay testimony?

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[3] Hereinafter called the Board.

[4] References to the formal papers, including the findings of fact, conclusions of law and orders of the Trial Examiner and of the Board printed as Volume I of the Transcript of the Record in the Court below are designated by the appropriate page number in Volume I of the Transcript of the Record preceded by "R."

References to portions of the testimony and exhibits, printed as the Joint Appendix to the briefs of the parties in the Court below, are designated by their appropriate page number in the Joint Appendix preceded by "J.A."

Nine copies of Volume I of the Transcript of the Record and of the Joint Appendix are filed herewith.

[5] Hereinafter called the Act.

STATUTES INVOLVED

The relevant statutory provisions are Sections 2(11), 7, 8(a)(1) and (3), and 10(b) and (e) of the National Labor Relations Act, as amended, 61 Stat. 136 (1947), 29 U.S.C. §§ 141-87 (1965). These provisions are set forth in Appendix B, *infra*.

STATEMENT

The Petitioner is a Texas corporation with a plant located at Foster Field, Victoria, Texas, where it is engaged in the maintenance and reconditioning of aircraft for the United States Air Force (R. 21, J.A. 133).

Commencing in November of 1963 and continuing at least into March of 1964, the International Association of Machinists, AFL-CIO,[6] began an organizational drive among the employees of the Petitioner at its Victoria, Texas, facility (J.A. 12).

In March of 1964,[7] the Petitioner employed some 250 employees at its Victoria, Texas, facility of whom approximately 60 were employed in the Tank Sealing Department under the supervision of Foreman Jack McCool (J.A. 167, 181-82).

During the week of March 8, the Petitioner instituted an economic reduction in force resulting in the termination of some 65 employees in the various departments at Petitioner's Victoria, Texas, facility (J.A. 169, 172).

The status of the leadmen. The employees in the Tank Sealing Department, supervised by Foreman Jack McCool, were divided into six crews with a leadman assigned to each crew, the composition of each crew varying from 5 to 11 men (J.A. 25, 107, 167, 181-82). At the start of each work-

[6] Hereinafter called the Union.

[7] Unless other noted, dates hereinafter refer to 1964.

day, McCool gave the crew leaders instructions as to what work their individual crews were to perform that day (J.A. 110). During the course of the day, McCool would relieve crew members from one job and assign them to work on other jobs (J.A. 25).

The uncontroverted evidence adduced solely by witnesses called by Counsel for the Board established the following facts with respect to the duties and responsibilities of the leadman, Andy Phillips.

Phillips was one of Foreman McCool's leadmen and the crew on which he worked was engaged in air checking wing tanks of the aircraft flown to Victoria for repair and reconditioning (J.A. 23). The type of work which the crew performed was routine in nature (J.A. 39-40, 53). Like the other employees in the crew, Phillips punched a time clock and was hourly paid (J.A. 30). Although Phillips had more work experience than any other employee in the crew and was its most senior member, he was not the highest paid employee in the crew (J.A. 31, 39). It is uncontroverted that Phillips did not have any authority to hire, fire, suspend, promote, lay off, recall, transfer or reward employees in the crew, or effectively to recommend that any such action be taken (J.A. 27, 33, 35, 37).

Coleman was another of Foreman McCool's leadmen, and, like leadman Phillips, was the most senior and experienced member of his crew (J.A. 131). Coleman worked under the direct supervision of McCool on the outer wing panels (J.A. 82, 132). Like Phillips, Coleman also received daily instructions from McCool as to what work was to be performed by the crew during that work day (J.A. 110), and during the day McCool spent a good portion of his time supervising the various activities of Coleman's crew (J.A. 64, 161-62). Coleman spent a substantial amount of his time

during his work day engaged in manual labor along with the other members of the crew and, like the other members of the crew, punched a time clock and was paid by the hour (J.A. 61, 134, 160). The work assigned to the crew was routine in nature (J.A. 86-87), requiring only routine direction by the leadman Coleman (J.A. 134). Coleman did not have the authority to hire, fire, lay off or discipline employees in the crew (J.A. 65, 135). Coleman had first to obtain approval from Foreman McCool for a transfer and, in turn, McCool would have to obtain the approval of the departmental foremen of the other crew to be affected (J.A. 125). In addition to spending two or three hours a day on manual work, Coleman was also responsible for the routine tasks of keeping worksheets showing the amount of time that the crew had been engaged on a particular job and also a "squawk book" which recorded various discrepancies found by the Company's Inspectors (J.A. 108, 127-28, 134-35).

The alleged independent violations of § 8(a)(1). Albert T. Beerwart, called by Counsel for the Board, testified that on Friday, March 13, he learned that Foreman McCool had told leadman Phillips to fire his son, Thomas Beerwart (J.A. 29). Albert Beerwart stated that his son, Thomas, had talked to Production Superintendent Shadwick, Foreman McCool and Andy Phillips and that shortly thereafter Phillips had left this group, come out under the wing of an aircraft where he and an employee, Leo Franklin, and an unidentified third employee were standing, and then informed Albert Beerwart that they were not going to fire his son *(Ibid.)* Albert Beerwart testified that he then inquired "if it were his Union activity" and that Phillips responded by shaking his head affirmatively (J.A. 30). Franklin, also called by Counsel for the Board, offered the same testimony (J.A. 56-57).

Thomas Beerwart testified that leadman Phillips informed him that he was going to be fired, that he asked why and was informed by Phillips that Foreman McCool had said that he was a Union agitator and that Phillips informed him that he (Phillips) had told "Jack" that Thomas Beerwart was not (J.A. 46). In a later conversation on the same day, Phillips informed Thomas Beerwart that he had told "Jack" that Thomas Beerwart could not be fired for being a Union agitator and that Production Superintendent Shadwick agreed (J.A. 51).

The discharge of Lodovico Freier. Freier began his employment with the Company at Victoria, Texas, in September of 1963 (J.A. 61). During the course of his employment, Freier worked with three different leadmen in various departments. When first employed, Freier worked with Plant Superintendent Shadwick, who at that time occupied the position of leadman *(Ibid.)*. While assigned to Shadwick's crew, Freier had been criticized by Shadwick for messy work (J.A. 85). Freier worked for Shadwick for approximately four weeks and was then transferred to Leadman Wickham's crew (J.A. 86). While working in Wickham's crew, Freier was again criticized for messy work *(Ibid.)*, and also received a written warning slip from Foreman McCool for installing parts incorrectly (J.A. 68-69).

In February, leadman Wickham's crew was disbanded (J.A. 168). At that time, Freier and two other employees approached Coleman and asked whether they could work on his crew, which was one man short at the time (J.A. 137). Coleman then approached the Foreman McCool and informed him that the three employees wanted to get into his crew and asked McCool if he could have Freier assigned to his crew. McCool acquiesced in Coleman's request and approved the transfer (J.A. 314). Coleman preferred

Freier over the other two employees, even though he had knowledge that Freier had had problems in the other crews in which he had worked, but explained that he requested Freier in an effort to give the man a chance to straighten himself out (J.A. 144, 157).

On the morning of March 9, Foreman McCool was informed by Production Superintendent Shadwick that he was to terminate 25 employees in the Tank Sealing Department (J.A. 168-69). McCool had work in progress at that time which had to be completed and consequently obtained Shadwick's approval for terminating only 22 of the 25 employees on Monday, March 9, with the understanding that the remaining employees would be terminated later in the same week (J.A. 172). Foreman McCool selected the four members of Coleman's crew to be terminated on March 9, informed Coleman and furnished him with the completed termination slips for the 4 employees (J.A. 152, 170).

It is not disputed that Petitioner received a telegram from the Union on March 10, notifying Petitioner that Freier and three other employees had been designated members of the Union's organizing committee at the plant (J.A. 1-2).[8]

On Friday, March 13, at approximately 9:00 or 10:00 a.m., Foreman McCool informed leadman Coleman that he was going to have to drop an additional man from his crew (J.A. 173). Coleman inquired of McCool as to which crew member would be terminated, and McCool told Coleman to think it over and they would discuss it later *(Ibid.)*. At

[8] Of the other organizing committee members in the telegram, F. M. Carr and Charles E. Ellis were still employed by Petitioner at the time of the Hearing before the Trial Examiner (J.A. 185-86), and J. W. McKelvain voluntarily quit Petitioner's employ (R. 49, J.A. 327-28).

approximately 11:30 a.m., Coleman told McCool that in his opinion Freier should be the man to be terminated. McCool inquired as to Coleman's reasons, and Coleman replied that Freier just was not as efficient as the rest of the remaining men in the crew and was the least experienced member remaining in the crew (J.A. 143, 174).

Coleman explained that he felt that Freier was just not as good as the remaining crew members (J.A. 143). Foreman McCool instructed Coleman to make out Freier's termination slip (J.A. 174). During the noon hour on March 13, Coleman approached Freier and informed him that he was being terminated and explained that he was chosen because he had less experience working in outer wing panels than the other men in the crew and that his work was not up to par compared with the rest of the men in the crew (J.A. 145). During this conversation, Freier asked Coleman whether he was being fired because of the Union, and Coleman answered "that he was not."

Approximately two weeks later, employee Lambert claimed to have asked Coleman why Freier had been terminated and said that he was told by Coleman that Foreman McCool had heard Freier talking Union over at the Warehouse and had said that Freier was going to have to go (J.A. 118). The incredible nature of Lambert's testimony regarding this conversation was demonstrated by the testimony of Freier, who denied that he engaged in any Union activity on the Company's premises, *at any time* (J.A. 175-78). Coleman denied making such a statement to Lambert regarding Freier and denied having any conversation with McCool about Freier's Union activities (J.A. 146-47). Foreman McCool likewise denied having any discussion with Coleman concerning Freier's purported Union activity (J.A. 175-76).

THE REASONS FOR GRANTING A WRIT

I. The conclusion by the Court below that the Company's leadmen Phillips and Coleman were supervisors within the meaning of § 2(11) of the Act is in conflict with the decisions of that Court and of other Courts of Appeal and raises an important question of federal law which has not been, and should be, settled by this Court.

In finding that the Company's leadmen were supervisors, the Court below considered the duties of Phillips and Coleman interchangeably and based its finding upon their asserted exercise of independent judgment in directing the work of the other members of their respective crews and on their power to make recommendations to their Foreman regarding transfers and discharges of employees. The record, however, is devoid of any probative evidence which even remotely supports a finding that either leadmen Phillips or Coleman was authorized to, or did in fact, make effective recommendations for the transfer or discharge of employees.

In *Northern Va. Steel Corp* v. *NLRB*, 300 F.2d 168, 171, 172 (4th Cir. 1962), the Court was faced with a question of whether a discharged employee was a supervisor, so as not to be entitled to the protection of the Act. The Court said:

> "The company points to six factors from which, it insists, we should conclude that the Board erred in finding that Combs was not a supervisor: He was paid a straight weekly salary; he checked the work of the welders to see that they were welding in the right place with a proper amount of weld; *he could make recommendations with respect to hiring and firing;* he was in charge of maintaining production of long span steel joists; and, lastly, the company relies on the trial

examiner's finding that Combs 'responsibly directed' other employees.

* * *

"Other factors emphasized by the company as showing Combs' supervisory status are not inconsistent with the Board's finding. Many skilled workers are paid a straight salary and exercise some degree of direction over the less skilled. *The same is true of Combs' asserted power to suggest hirings, firings and transfers — which the record shows was actually exercised only one time — for trusted nonsupervisory employees often are looked to for such suggestions.*

"In summary, we think the evidence ample to sustain the Board's conclusion that Combs was no more than a 'gangleader,' and, therefore, outside the disqualifying statutory provision." (Emphasis supplied.)

Another Circuit has recently reached the same conclusion. In *Plastic Workers Union, Local 18* v. *NLRB (Sinko Mfg. & Tool Co.)*, 369 F.2d 226, 228, 230 (7th Cir. 1966), the Court held:

"The Board concluded that Carson had been represented to his fellow employees as a supervisor, authorized to direct fellow employees in a manner requiring independent judgment as a supervisor and agent of the employer within the meaning of the Act. . . .

"Dewey Carson worked in Sinko's warehouse along with six or seven other employees. The Board lays great stress on such items of evidence as the following:

"Donald Downs, foreman of the warehouse division from January, 1961, to March 17, 1961, testified that Carson was 'in charge' of the finished goods section, i.e. storing finished products in cartons and grinding. He said that he was told that by Plant Manager Jack Condran when he was moved into the warehouse and was assigned to setting up an inventory and straightening out the warehouse. Downs testified that he was

Carson's boss and he told Carson what duties he wished performed on a day-to-day basis. When overtime was occasionally authorized for the finished goods section by the plant manager, Downs said he let Carson pick out the men who would work."

* * *

"Viewed in the context of the whole record we find no support for a finding that Carson was other than a senior employee, leadman or straw boss carrying out routine instructions which did not require the exercise of independent judgment, and not a supervisor within the meaning of the Act."

It is well established that individuals who possess no indicia of supervisory status or who only irregularly and sporadically exercise supervisory authority are not supervisors within the meaning of § 2(11) of the Act.

In *Precision Fabricators, Inc.* v. *NLRB,* 204 F.2d 567, 568 (2d Cir. 1953), the Court held that the mere fact that an employee assigns work to other employees in an attempt to keep such other employees occupied is not sufficient of itself to classify such employee as a supervisor and stated:

"The petitioner contends that in addition to operating machines, Petti had the supervisory duty to 'assign' the work to be done by the other employees in the department. Mr. Bishop, the Production Manager, testified that he would give Petti a 'production list' and 'orders' from one to three times a week [in contrast to daily in the instant case]. The list would contain 'the customers' names, the parts that were to be run, and what date was on the schedule that we had to meet to satisfy the customer.' Petti himself testified 'Everything that I did or the employees was [sic] suppose to do, I did by Mr. Bishop's information to me.' The Trial Examiner on the entire record found 'that though Petti may have assigned work to other employees, whatever authority he exercised was of a

routine nature pursuant to Bishop's direction and that he was not a supervisor within the meaning of the Act.' We agree with this conclusion. Petti did no more than to keep all hands busy on the work given him by Mr. Bishop. When an employee finished a job she would ask Petti what to do next. We will assume that he was the room 'boss' or 'leadman,' but the discretion given him appears to be 'routine' in the natural sense of that word. As Judge Magruder said in National Labor Relations Board v. Quincy Steel Cast Co., 1 Cir., 200 F.2d 293, 296: 'The legislative history of § 2(11) tends to support the Board's view that certain employees with minor supervisory duties, such as strawbosses and leadmen, were not intended to be excluded from the coverage of the Act.'"

II. The Court below erred in basing its decision solely on hearsay evidence which was admitted, over the timely objection of Counsel for Petitioner, in conflict with applicable decisions by this Court and the decisions by that and the other Courts of Appeal.

Counsel for Petitioner repeated, by timely objection during the course of the hearing, challenged as hearsay all the conversations which formed the basis for the Court's findings that Petitioner had violated the Act.[9] The objections were renewed in the Petitioner's Exceptions to the Trial Examiner's Decision, in its Brief to the Court below and in its Petition for Rehearing and Brief in Support thereof to that Court (J.A. 23, 28, 117, 131, R. 56, 58-59, 60-62).

As the Court below apparently recognized, the testimony of Albert and Thomas Beerwart and Franklin was un-

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[9] The Trial Examiner reserved ruling on the admissibility of hearsay testimony given by Albert and Thomas Beerwart and Leo Franklin (J.A. 131-32). However, neither the Trial Examiner nor the Board in fact ever made a ruling regarding the admissibility of this hearsay testimony.

deniably hearsay insofar as it was asserted to prove the truth of the statement therein, i.e. that McCool had threatened to discharge Thomas Beerwart. The testimony was admissible, if at all, only to demonstrate what Phillips is alleged to have said to the employees. Since Phillips was not a supervisor within the meaning of the Act, he did not speak with "the voice of management," and his alleged statements, even if credited, constituted no violation of the Act.

Section 8(a)(1) and (3) of the Act does not prohibit an employer from exercising its managerial prerogative of discharge, unless it is established, through legally competent evidence, that the motivating purpose of the employer in effectuating a discharge is to discourage union activity. *Riggs Distler & Co.* v. *NLRB*, 327 F.2d 575, 580 (4th Cir. 1963); *NLRB* v. *Florida Steel Corp.*, 308 F.2d 931, 935-36 (5th Cir. 1962); *NLRB* v. *Ford Radio & Mica Corp.*, 258 F.2d 457, 461 (2d Cir. 1958).

In finding that Petitioner violated § 8(a)(1) and (3) of the Act by terminating Freier on March 13, the Court below adopted the rationalization of both the Board and the Trial Examiner that Coleman's reasons for recommending Freier for transfer into and termination from his crew were inconsistent and hence imputed to Petitioner an illegal motive for terminating Freier which has as its sole foundation the above-discussed hearsay testimony of the witnesses Albert and Thomas Beerwart, Franklin and Jerry Lambert. When introduced for the purpose of establishing what Foreman McCool said, Lambert's testimony was likewise hearsay. The Court below, on Petition for Rehearing, refused to consider the applicability to the instant case of its earlier holding in *General Tire, Inc.* v. *NLRB*, 332 F.2d 58, 60, 61 (5th Cir. 1964). That case involved a fact situation essentially indistinguishable from that in the present case, and

the Court below reached the obviously proper conclusion that the testimony was hearsay. In that decision, the Court said:

> "In the final analysis, the evidence of discriminatory discharge comes down to what a couple of employees said supervisor Bailey said he heard the station manager say as to the cause of Oliveria and Hester's discharge.
>
> * * *
>
> "What we have is: witness *A* testifies he overheard *B* state that *C* said such and such. Obviously *A* could prove what *B* said. But the decisive thing is what *C* is supposed to have said. And *A* cannot prove what *C* said by stating what *B* said *C* said. And yet, for all practical purposes, that is all we had here since *B* — Supervisor Bailey — in this barroom after-the-event discourse did not undertake, assuming he had that knowledge or position in the Company hierarchy — to state what he, rather than the station manager *(C)* had done or said."

In the instant case an illegal motive for the discharge is imputed to the Company the basis of the testimony of Lambert, which was rendered inherently incredible by Freier's own testimony that he engaged in no Union activities anywhere on Company property, as to what Coleman said McCool said. The testimony of Lambert was therefore, like that of the Beerwarts and Franklin, hearsay. The *only* evidence in the record by which an illegal motive for the discharge can be imputed to Petitioner is thus hearsay.

The use of hearsay evidence to impute an illegal motive to a discharge was rejected, in a fact situation strikingly similar to this case, in *Pittsburgh S.S. Co.* v. *NLRB,* 180 F.2d 731, 740-41 (6th Cir. 1950), *aff'd,* 340 U.S. 498, wherein that Court stated:

"Since the examiner considered that the incompetence shown was unsubstantial, he concluded that Shartle was discharged for union activity. It is undenied that neither the first mate nor the captain mentioned the union to Shartle at the time of his discharge. Also there is not a shred of testimony with reference to coercion or restraint of Shartle, who does not claim that he was in any way hindered in his organizing.

"Certain wholly incompetent testimony was admitted to the effect that Shartle was discharged because of union activity.[5] After his discharge Shartle talked to the men on the ship, the electricians, the firemen, the oilers, the coalpassers, the steward, the second cook, the porter, the deck hands, the deck watch, and the watchmen, and asked them whether he was competent. He said they assured him that he was, and that he was discharged for union activity. Reading the case in the light of the whole record we conclude that Shartle was discharged for cause and that the finding that he was discharged because of union activity is not supported by reliable, substantial, and probative evidence. Cf. National Labor Relations Board v. Riverside Mfg. Co., 5 Cir., 119 F.2d 302, 307."

In footnote 5, the Court further noted as follows:

"Hearsay testimony was repeatedly admitted by the examiner over objection, and was made the basis of important findings. Hearsay testimony to the effect that Captain Wallace intended to discharge George W. Anderson because he was a union man was detailed at length in the intermediate report. Anderson was never discharged. The examiner also relied on hearsay testimony to the effect that Zyp, an employee of petitioner without authority to discharge men had recommended to Captain Brinker the discharge of Lee. Lee was not discharged."

The decisions of this Court and of the various Courts of Appeals have uniformly held that hearsay testimony alone is insufficient to support a Board finding where, as

in the instant case, it is either specifically denied or has been substituted for direct evidence which is conveniently available.

In *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229-30, this Court stated the general test:

> "The companies urge that the Board receive 'remote hearsay' and 'mere rumor.' The statute provides that 'the rules of evidence prevailing in courts of law or equity shall not be controlling.' The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere omission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. [citation omitted] But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence."

Accord, Willapoint Oysters, Inc. v. *Ewing*, 174 F.2d 676, 691 (9th Cir. 1949), *cert. denied*, 338 U.S. 860.

In *Pittsburgh S.S. Co.* v. *NLRB, supra*, at 733, the Court of Appeals, on remand from this Court, considered the applicability and possible effect of both the Administrative Procedure Act[10] and the Taft-Hartley Act upon Board procedures and upon the scope of judicial review of Board orders and stated:

> "The Board concedes that the review in this court is controlled by the two statutes, but contends that the scope of judicial review as to findings of fact has in no way been affected by them. We think this contention is erroneous. The provisions of § 10(e) of the Administrative Procedure Act that the reviewing court

[10] Ch. 324, 60 Stat. 237 (1946) (codified in scattered sections of 5 U.S.C.).

shall hold unlawful and set aside agency action, findings and conclusions found to be 'unsupported by substantial evidence' and that in making this determination the Court shall 'review the whole record,' is new. Moreover, the rules concerning evidence have been expressly changed by both the Taft-Hartley Act and the Administrattive Procedure Act. . . . In the Taft-Hartley Act [§ 10(b)] Congress eliminated this language and substituted a provision that hearings 'shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States.' . . .

"Section 7(c) of the Administrative Procedure Act is new and emphatic. It provides as follows:

'. . . Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. . . .'

"These statutes were designed to eliminate the wholesale use of hearsay, the drawing of expert inferences not based upon evidence, and the consideration of only one part or one side of the case."

Accord, NLRB v. *Russell Mfg. Co.*, 191 F.2d 358, 360 (5th Cir. 1951); *NLRB* v. *Washington Dehydrated Food Co.*, 118 F.2d 980, 985 (9th Cir. 1941); *Martel Mills Corp.* v. *NLRB*, 114 F.2d 624 (4th Cir. 1940).

The successive inferences drawn by the Board and the Court below regarding the termination of Freier, being unsupported by legally competent evidence, "do no more than create a suspicion of the existence of the fact[s] to

be established." *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300; *accord, Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 23-CA-1772

GARY AIRCRAFT CORPORATION

and

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO

DECISION AND ORDER

On December 11, 1964, Trial Examiner George A. Downing issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and is engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Trial Examiner's Decision attached hereto. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a brief in support thereof.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the Board hereby adopts as its Order the Order recommended by the Trial Examiner and orders that the Respondent, Gary Aircraft Corporation, San Antonio, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C.
Feb. 15 1965

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John H. Fanning, Member

.....
Gerald A. Brown, Member

.....
Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

151 NLRB No. 3

TXD-689-64
San Antonio, Tex.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case No. 23-CA-1772

GARY AIRCRAFT CORPORATION

and

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO

William H. Helms, Esq.,
for the General Counsel.

L. G. Clinton, Jr., and *R. B. Bambace, Esqs.*
(Fulbright, Crooker, Freeman, Bates & Jaworski),
of Houston, Tex., for Respondent.

Mr. V. M. Cameron, of Fort Worth, Tex., and
Plato Papps, Esq., of Washington, D.C.,
for the Charging Party.

Before: *George A. Downing*, Trial Examiner.

TRIAL EXAMINER'S DECISION

Statement of the Case

This proceeding under Section 10(b) of the National Labor Relations Act was heard in Victoria, Texas, on August 11 and 12, 1964, pursuant to due notice. The complaint, issued on June 5, 1964, based on charges and amended charges dated March 25, May 13, and May 28, 1964, alleged in substance that Respondent engaged in unfair labor practices proscribed by Section 8(a)(1) and (3) of the Act by informing employees that it had selected employees for

discharge because of their union membership and activities and by discharging Lodovico Freier on March 13, because of his union membership and activities.[1] Respondent answered, denying the allegations of unfair labor practices and also denying that Leadmen Andy Phillips, Jerry D. Lambert, and Lonnie G. Coleman were its agents and supervisors.

Upon the entire record in the case and from my observation of the witnesses, I make the following.

Findings of Fact

I. Jurisdictional findings

Respondent, a Texas corporation with its principal office at San Antonio, Texas, maintains a plant at Foster Field, Victoria, Texas, where it is engaged in the manufacturing and overhauling of aircraft components and aircraft overhauling for the United States Air Force. During the course of its fiscal year from April 1962 to April 1963, Respondent performed services for the Department of Defense (U. S. Air Force) in an amount of $170,000; it made sales to or performed services for customers outside the State of Texas in an amount exceeding $50,000, and it purchased from extrastate sources goods or services also in an amount exceeding $50,000. Respondent is therefore engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The labor organization involved

International Association of Machinists, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

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[1] An allegation of surveillance was dismissed at the hearing on Respondent's motion, joined in by the General Counsel, and an allegation of interrogation is now hereby dismissed, with the General Counsel's concurrence as stated in his brief.

III. The unfair labor practices

A. *Introduction and issues*

Respondent employs some 250 production and maintenance employees in its plant at Foster Field where it is engaged in the maintenance and reconditioning of C-54 aircraft for the United States Air Force. After some preliminary organizational effort by IAM in November 1963 and January 1964, a general meeting of employees was held on March 9 and was attended by some 14 employees. An in-plant organizing committee was chosen, and on the following day the Union notified Respondent by telegram that it was conducting an organizing drive and that Lodovico Freier, J. W. McElvain, F. M. Carr, and Charles E. Ellis were members of its organizing committee. On March 9 Respondent made a general reduction in force, terminating some 61 employees in various departments, and on March 13, it terminated Freier and 2 other employees.

The chief issue herein is whether Respondent was discriminatorily motivated in terminating Freier or whether his termination was part of the reduction in force. Subsidiary issues are whether Leadmen Lonnie G. Coleman, Jerry D. Lambert, and Andy Phillips were supervisors within the meaning of Section 2(11) and whether Respondent is responsible for certain statements made by Leadman Phillips.

B. *Leadmen as supervisors*

As is typical of such borderline cases as leadmen, crew leaders, and working foremen, there were facets of the evidence here which pointed both in the direction of employee status and in that of supervisory status. Except as discussed below, however, the evidence did not establish that the leadmen had or exercised any of the supervisory powers

listed in Section 2(11) of the Act. What is chiefly in issue under the evidence is whether they responsibly directed the crew members, whether they had and exercised authority effectively to recommend the transfer and discharge of employees, and whether their position was such as to identify them as representatives of management in the eyes of the employees.

Of some 250 production and maintenance employees prior to March 9, more than 100 were employed in the tank sealing department under the general supervision of Foreman Jack McCool. More than 60 of those worked on the day shift on 6 separate crews, each of which was under a leadman, and the remainder worked on the night shift under the supervision of a single foreman. Four of the crews worked in the hangar, where McCool had his office and where he spent 80 percent of his time, but the other two worked at the warehouse, a block or more away. Save for the leadmen, there was no one in the supervisory hierarchy between McCool and the employees on the day shift.

Specifically in issue was the supervisory status of Jerry Lambert, Lonnie Coleman, whose crew worked at the warehouse, and Andy Phillips, whose crew worked at the hangar. Though Lambert did not become a leadman until after the events involved herein, his testimony concerning the authority he exercised as leadman was relevant to the issue of the status of leadmen generally.

The leadmen punched the timeclock and were paid at hourly rates like the other employees, but they received substantially higher wages than all except the most experienced crew members. They also did a substantial amount of manual work, though it generally consisted of the lending of a temporary hand and of demonstrating to inexperienced

employees how to do the job.[2] Thus Coleman testified as Respondent's witness that he averaged possibly 2 or 3 hours a day in helping out and in showing employees how to do something, and that he walked from pair to pair (of the two men teams) "and tried to get things going." He spent the remainder of his time in doing "paper work," i.e., in taking care of the work sheets for the jobs, the timecards, and the "squawk book," in which the inspectors listed all discrepancies in the work.

Coleman testified further that McCool spent from 20 minutes to 2 hours at the warehouse (McCool estimated his warehouse time at 20 percent), that McCool would explain to Coleman what he wanted and would outline the work schedule, and that it was up to Coleman to get the work done. Lambert testified similarly that McCool gave him general instructions as to the work to be done, that he then assigned the duties to the crew members, and that he spent some 80 percent of his time in assigning jobs and looking over the work of the employees and the remaining 20 percent on paper work and in taking care of the squawk book. As for Phillips, Albert Beerwart testified that Phillips assigned most of the work to the men, making some of the decisions himself, because there was no one else around to make them.

Beerwart also testified that Phillips made recommendations for raises and that he "wrote out the papers" for the discharge of an employee and informed him he was fired, though Beerwart did not know who had made the decision. Lambert testified without denial that he recommended to

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[2] Freier testified without denial that Coleman and the other leadmen wore white shirts and khaki pants, that the crewmen wore brown shirts and regular work clothes, and that Coleman never became dirty, as did the crewmen, from working with the black compound which was used on the job.

McCool the transfer from his crew of Thomas Beerwart and that McCool approved the transfer, and that he similarly informed McCool he wanted to discharge one Frank Soto, that McCool approved, and that he (Lambert) signed the termination slip specifying that he had initiated the discharge action. Similar evidence concerning Coleman's participation in transfers and discharges is summarized under section D, *infra,* dealing with Freier's discharge, as is also evidence concerning Coleman's action in assembling and lecturing his crew on the subject of union solicitation on the job.

Concluding Findings

As Section 2(11) is to be read in the disjunctive, an employee qualifies as a supervisor if he exercises any one of the powers there specified. *West Penn Power Company* v. *N.L.R.B.* (C.A. 3) 57 LRRM 2387, 2389, and cases there cited. Of course, the mere responsibility of making work assignments in a routine fashion does not make an employee a supervisor, nor the mere fact that he spends a portion of his time instructing less experienced employees. *Id.* Here, however, the circumstances were such that because of McCool's relative remoteness from the men, there was no one else around for much of the time to make assignments or decisions or to direct the work, and when those facts are coupled with the leadmen's responsibility for getting the job done, the authority which the leadmen exercised was plainly lifted above the routine class. Furthermore, a finding that the leadmen were not supervisors would mean, of course, that McCool was the only supervisor over some 60-odd employees working in 6 separate crews and at 2 different locations, a clearly disproportionate ratio of employees to admitted supervisors.

I also conclude and find on Lambert's undenied testimony and on the evidence surrounding Coleman's participation in the transfer and discharge of Freier (Section D, *infra*) that the leadmen were authorized to make, and that they did make, effective recommendations for the transfer and discharge of employees.

Finally, I conclude and find from all the evidence, including the participation of the leadmen in initiating and in making discharges and including the employee appeals to Coleman concerning Freier's union activities, that the leadmen occupied a position in which they were identified as representatives of management in the eyes of the employees.

I therefore conclude and find that Leadmen Coleman, Phillips, and Lambert were supervisors within the meaning of Section 2(11) of the Act.

C. *Interference, restraint, and coercion*

Albert T. Beerwart testified that on March 13, Leadman Phillips reported to him that McCool had directed the discharge of Beerwart's son, Thomas, but later informed him that another employee had been chosen instead. When Beerwart inquired whether Thomas was to have been discharged because of his union activities, Phillips nodded affirmatively. Corroborating testimony was given by Leo Franklin.

Thomas Beerwart testified that when Phillips informed him he was to be discharged, he asked the reason, and that Phillips replied that McCool said that Beerwart was a union agitator but that Phillips told McCool that Beerwart was not.

Phillips was not called as a witness, and McCool's testimony contained no denial of the statement allegedly attributed to him by Phillips.

I conclude and find that by Phillips' statements that Thomas Beerwart had been selected for discharge because of his union activities, Respondent interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

D. *Discrimination — Freier's discharge*

There is little dispute concerning the circumstances of Freier's discharge; only the question of motive is in issue. Freier had worked on Leadman Wickham's crew until Friday, February 28, when the crew was broken up. Freier applied to Leadman Coleman for a transfer to his crew (as did Leadman Wickham and another employee), and Coleman, who was familiar with Freier's work on an earlier job, chose Freier, and McCool approved the transfer, despite the fact that Freier had shortly before received a written reprimand concerning his job performance. Freier began work on Coleman's crew on March 2 and was discharged on March 13.

In the meantime the Union's telegram of March 10 (see Section A, *supra*) informed Respondent that it was conducting an organizing drive and that Freier was a member of the organizing committee. Actually, Respondent had prior knowledge that Freier was engaged in organizing activities, for Coleman admitted on cross-examination that shortly after Freier came onto his crew,[3] two of the men complained to him about Freier's solicitations to attend a union meeting and asked Coleman to have Freier leave them alone. Coleman accordingly assembled the entire crew

[3] As there is no evidence that Coleman knew of Freier's activities prior to that time, Freier's testimony concerning a statement made by Coleman (and denied by the latter) that Coleman was supposed to "get rid of" Freier after working him for a few days is without value on the issue of discriminatory motivation.

and told them that if they talked about the Union, they should do so on their own time.

The reduction in force on March 9 included 22 employees in McCool's department, 4 of whom were in Coleman's crew and who were selected by McCool after seeking Coleman's opinion as to the correctness of the selection. Coleman agreed that McCool had made the best choices and did not suggest that Freier would be a better choice for discharge than any of the four.

Freier testified that on March 13, Coleman informed him immediately after the lunch hour, "I am going to have to let you go," stating as the reason that Freier was the man with the least seniority on the crew and also the one with the least experience. Coleman exhibited to Freier a termination slip which recited that the cause of termination was, "Work not up to Gary Aircraft standard for period of time employed," and on the line marked "Termination initiated by," Coleman's name appeared.

When Freier questioned the soundness of the cause assigned, Coleman indicated unwillingness to talk about the matter, and when Freier suggested it might be easier for Coleman if he left at once, Coleman agreed. On a subsequent trip to the plant to pick up his toolbox, Freier questioned Coleman as to whether his union participation had anything to do with the discharge, but Coleman did not answer him.

Leadman Lambert testified, however, that about a week after Freier's discharge (before Lambert became a leadman), he questioned Coleman as to why Freier was terminated and Coleman informed him that McCool had heard Freier "talking union" over at the warehouse and had said that Freier was going to have to go.

We turn now to Respondent's evidence.

McCool testified that he was instructed by Production Superintendent Shadwick on the morning of March 9 to terminate 25 of the employees in his department (out of a total of 65 to be laid off); but because certain work in progress needed to be completed, he obtained Shadwick's approval to terminate only 22 of the 25 and to retain 3 until later in the week. One of his employees quit during the week, leaving two to be laid off, and McCool notified Coleman on the morning of March 13 that Coleman had to let one more man go and that Coleman should, "Think it over and let [McCool] know." Coleman notified McCool just before the lunch period that he thought Freier should be terminated because he "wasn't getting it" and had the least seniority and the least experience on the crew. McCool thereupon directed Coleman to make out the termination slip, and Coleman later informed him that Freier was leaving immediately.

McCool testified that he had no discussion with Coleman regarding Freier's union activities and did not know whether Freier in fact had engaged in union activity. He denied ever telling Coleman he had heard Freier talking union in the warehouse and denied telling Coleman that because Freier was talking union he would have to let Freier go. McCool made no denial, however, of the statements attributed to him by Phillips concerning Thomas Beerwart, summarized in section C, *supra*.

Coleman's testimony was in substantial accord with McCool's and was not in substantial conflict with Freier's testimony concerning the actual making of the discharge. He testified in part that McCool told him to make out the termination slip and to take care of the discharge, and that he specifically denied Freier's suggestion that he was being discharged because of the Union.

Coleman testified that he chose Freier originally over Leadman Wickham for transfer to his crew because he knew of Freier's capabilities from working with him on an earlier job, and that Freier was superior to Wickham in his ability to work and could "work circles around" Wickham. As regarded seniority, Coleman admitted that Freier had seniority plantwide over many members of his crew, including the four who were terminated on March 9, all of whom had been on Coleman's crew longer than Freier. But as for March 13, Coleman explained his choice of Freier on the basis that Freier's attitude was poor and his seniority was less than that of the other crew members. Indeed, Coleman went on to testify that Freier's attitude was poor before he came to Coleman's crew, that Freier had been having trouble over in the hangar, and that even after he came with Coleman he was slow and did a lot of talking and "just wasn't as good as the rest of the men there." In the face of that testimony, however, Coleman conceded that McCool had chosen correctly the four men to be discharged on March 9.

Coleman also denied Lambert's testimony concerning their discussion of Freier's discharge. I credit Lambert, however, because of the inconsistencies in Coleman's explanations concerning Freier as above set forth and as later more fully adverted to and because of the indirect corroboration which Lambert received from the undenied statements concerning the basis on which McCool had originally chosen Thomas Beerwart for discharge.

Concluding Findings

The burden was on the General Counsel, of course, to establish by a preponderance of the evidence on the entire record that Respondent discharged Freier because of his union membership and activities as alleged. *W. C. Nabors*

Company, 89 NLRB 538, 540 enforced 196 F. 2d 212 (C.A. 5) cert. denied 344 U.S. 865. Considering the case first as it was postured by the General Counsel's evidence, a *prima facie* case was plainly made out that Respondent was discriminatorily motivated in discharging Freier. Thus, on the heels of formal notification from the Union that an organizing drive was under way and that Freier was on the Union's committee, Respondent discharged Freier and simultaneously informed Thomas Beerwart that he also had been selected for discharge because McCool considered him a union agitator. Evidence that the motive was identical in Freier's case was supplied by Lambert's testimony concerning Coleman's statements made to him a week after Freier's discharge.

We turn then to the question whether Respondent's evidence was sufficient to overcome the General Counsel's case, which otherwise clearly requires a finding that Respondent discharged Freier because of his union membership and activities.

On analysis, however, Respondent's evidence falls far short of establishing its defenses and, indeed, in certain respects tends to confirm the General Counsel's own showing. That was particularly true of much of Coleman's testimony, who was chargeable under Respondent's case with having made the selection for discharge and who was entrusted with the actual handling of the discharge. To be noted at the outset was Coleman's admission of knowledge of Freier's union activities which reached him sometime prior to the union meeting of March 9. Significant also was the fact that at the time of the transfer a few days earlier, Coleman held Freier's capabilities in high regard, having chosen him over a leadman, who generally excels his crew members in skill and seniority. Similarly, as late as the reduction in force on March 9, Coleman did not question

McCool's selection for discharge of four other employees nor did he suggest that Freier should be substituted for any of the reasons which he was to assign some four days later or later still as a witness on the stand. It is plain that Coleman's later appraisal of Freier was inconsistent with his earlier one and that if Freier's performance were as unsatisfactory as Coleman later attempted to make it out to be, he would not have chosen Freier for transfer in the first instance and would have recommended him to McCool for discharge on March 9 in the second instance.

And because under Respondent's case it was Coleman who acted for it in choosing Freier and in effecting his discharge, McCool's testimony is of no assistance in overcoming the inconsistencies presented by Coleman's explanations. Thus, assuming the *bona fides* of McCool's explanations for delaying until March 13 the completion of the reduction in force, it was Coleman who made the selection and who carried through the discharge action and it was Coleman alone who undertook to explain the basis of his selection in the light of the earlier happenings. Furthermore, McCool himself had chosen Thomas Beerwart to complete the reduction and had assigned to Phillips in explanation the same ground (i.e., union activities) which Coleman later assigned to Lambert in explaining Freier's discharge.

Respondent also points to the fact that it discharged none of the other three members of the Union's organizing committee, and the General Counsel points in turn to the fact that two of the three were not in McCool's department and that the third one, who was, quit the day before Freier's discharge. In any event, I find the foregoing facts to be without significance, under all the evidence, on the issue of discriminatory motivation.

I therefore conclude and find on the clear preponderance of the evidence on the record as a whole that Respondent discharged Freier because of his union membership and activities.

Upon the basis of the foregoing findings and fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent engaged in unfair labor practices proscribed by Section 8(a)(1).

2. By discharging Lodovico Freier on March 13, 1964, because of his union membership and activities, Respondent engaged in discrimination to discourage membership in the Union, thereby engaging in unfair labor practices proscribed by Section 8(a)(3) and (1) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action which is conventionally ordered in such cases, as provided in the Recommended Order below, which I find necessary to remedy and to remove the effect of the unfair labor practices and to effectuate the policies of the Act. For reasons which are stated in *Consolidated Industries* 108 NLRB 60, 61, and cases there cited, I shall recommend a broad cease and desist order.

Upon the foregoing findings of fact and conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

RECOMMENDED ORDER

Gary Aircraft Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Association of Machinists, AFL-CIO, or in any other labor organization of its employees, by discharging or in any other manner discriminating against employees in regard to hire or tenure of employment or any term or condition of employment.

(b) Informing employees that they have been selected for discharge because of their union activities.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist said International Association of Machinists, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action:

(a) Offer to Lodovico Freier immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered by payment to him of a sum of money equal to that which he would normally have earned from March 13, 1964, to the date of the offer of reinstatement, less his net earnings during said period (*Crossett Lumber Company*, 8 NLRB 240), said backpay to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289, together with interest thereon at the rate of 6 percent per annum. *Isis Plumbing & Heating Company*, 138 NLRB 716.

(b) Notify the above-named employee if presently serving in the Armed Forces of the United States of his rights to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training Service Act of 1948 as amended, after discharge from the Armed Forces.

(c) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under these recommendations.

(d) Post in its offices and plant at Foster Field, Victoria, Texas, copies of the notice attached hereto marked Appendix A.[4] Copies of said notice to be furnished by the Regional Director for the Twenty-third Region shall, after being signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Twenty-third Region in writing within 20 days from the receipt

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[4] If these Recommendations are adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. If the Board's Order is enforced by a decree of the United States Court of Appeals, the notice will be further amended by the substitution of the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" for the words "A DECISION AND ORDER."

of this Decision what steps the Respondent has taken to comply herewith.[5]

Dated at Washington, D.C.

/s/ GEO. A. DOWNING
George A. Downing
Trial Examiner

[5] If these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Twenty-third Region in writing within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO THE
RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

WE WILL NOT discourage membership in INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, or in any other labor organization, by discharging employees or in any other manner discriminating in regard to hire or tenure of employment or any term or condition of employment.

WE WILL NOT inform employees that we have selected employees for discharge because of their union membership or activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form, join, or assist said INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

WE WILL offer to Lodovico Freier immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered as a result of our discrimination against him, in the manner provided in the Trial Examiner's Decision.

All our employees are free to become or remain, or refrain from becoming or remaining, members of the above-named or any other labor organization.

GARY AIRCRAFT CORPORATION
(Employer)

Dated..... By .....
(Representative) (Title)

NOTE: We will notify the above-named employee if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 6617 Federal Office Building, 515 Rusk Avenue, Houston, Texas 77002 (Tel. No. Capitol 8-0611, Ext. 4271) if they have any question concerning this notice or compliance with its provisions.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 22950

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus

GARY AIRCRAFT CORPORATION,

Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D.C.

(November 8, 1966.)

Before JONES and DYER, Circuit Judges, and SPEARS, District Judge.

DYER, Circuit Judge: Having considered, decided and written so much in prior Board enforcement proceedings, we find nothing new or different in this case that takes it out of the ambit of settled jurisprudence. No detailed discussion of the evidence is therefore necessary.

The Board approved the findings and conclusions of the Trial Examiner that Beerwart had been selected for discharge because of his union activities, and therefore the company interfered with, restrained and coerced its employees in violation of Section 8(a)(1), and dismissed em-

ployee Freier because of union activity, which is proscribed by Section 8(a)(3) and (1).

Respondent urges that the findings as to both Beerwart and Freier were based upon hearsay testimony of leadmen, and that Freier was discharged along with others because of an economic reduction in force.

The Company's Tank Sealing Department, having approximately sixty day shift employees, was under the general supervision of Foreman McCool. The department was divided into six crews of varying numbers, each headed by a leadman. There was no one in the supervisory hierarchy between McCool and the leadmen. McCool spent about eighty percent of his time in the office. Each day he outlined the work schedule generally to the leadmen, who then assigned particular work to the employees in the crews. It was the responsibility of the leadmen to direct the work and see that it was accomplished, and when a job was completed the leadmen directed the employees as to the work next to be undertaken, for there was no one else to do so. Thus the authority that the leadmen exercised clearly required the use of independent judgment. The leadmen were also responsible for keeping work sheets showing the amount of time spent on a particular job and the "squawk" book listing work discrepancies found by the inspection department. In correcting mistakes and demonstrating the proper way to do a job, checking work, and helping out when necessary, the leadmen performed varying amounts of manual labor. Additionally, the leadmen made effective recommendations to the foreman for raises for employees in their crews, and, although the foreman had the ultimate authority to hire, fire and transfer employees, the recommendations of the leadmen concerning transfer and discharge of employees played a determinative role. There was therefore substantial evidence on the record as a whole

that the leadmen were supervisors within the meaning of the Act.[1] *N.L.R.B.* v. *Charley Toppino and Sons, Inc.*, 5 Cir. 1964, 332 F.2d 85; *N.L.R.B.* v. *Big Three Welding Equipment Company*, 5 Cir. 1966, 359 F.2d 77.

The credited testimony showed without contradiction that the voice of management through the leadmen indicated that Beerwart was to be fired because he was a union agitator. There was thus a clear showing of discriminatory intent which had a coercive impact. *N.L.R.B.* v. *Ferguson*, 5 Cir. 1958, 257 F.2d 88.

Freier, who had been with the company since September, 1963, joined leadman Coleman's crew on March 2, 1964, having been selected by the latter because he "could work circles around" his former leadman. When an economic reduction in force took place on March 9, 1964, four men were laid off in Coleman's crew, but Freier's name was not then discussed between Coleman and the foreman. That night Freier attended a union meeting and was signed as an in-plant organizer, which was made known to the company the next day by a telegram from the union. On March 13, 1964, Freier was terminated, his slip stating that his work was not up to the company standard for the period of time employed. Leadman Coleman explained that he chose Freier for discharge rather than others, because Freier's attitude was poor and his seniority was less than that of the other crew members, in spite of the fact that he was selected by Coleman only eleven days before and was not considered for

[1] The use of the word "leadman" as a title or job description is, of course, not the controlling determination of whether one is in a supervisory capacity under the Act. What counts is whether or not one has the power to act in accordance with the criteria set out in Section 2(11). Thus the cases of *Poultry Enterprises, Inc.* v. *N.L.R.B.*, 5 Cir. 1954, 216 F.2d 798 and *N.L.R.B* v. *Griggs Equip., Inc.*, 5 Cir. 1962, 307 F.2d 275 are readily distinguishable.

discharge in the reduction of force on March 9, 1964, when twenty-two employees in the tank department, four of whom were in Coleman's crew, were discharged.

The Company's explanations were properly rejected by the Board, because they were not so overwhelming as to make the contrary evidence unacceptable as a matter of law. *N.L.R.B.* v. *Jackson Tile Manufacturing Company*, 5 Cir. 1960, 282 F.2d 90.

We are convinced that substantial evidence on the record as a whole supports the Board's findings that the company interfered with, restrained and coerced its employees in violation of Section 8(a)(1) of the Act, and discharged employee Freier because of his union activity in violation of Section 8(a)(3) and (1). Accordingly, the Board's order is

ENFORCED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1966

No. 22950

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

GARY AIRCRAFT CORPORATION,
Respondent.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before JONES, DYER, Circuit Judges, and SPEARS, District Judge.

JUDGMENT

This cause came on to be heard on the petition of the National Labor Relations Board for enforcement of an order of the National Labor Relations Board made on February 15, 1965, in the proceedings known upon the records of the Board as Case No. 23-CA-1772; and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the order of the Board in this cause be and the same is hereby, enforced.

"Per David W. Dyer, Circuit Judge"
November 8, 1966

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22950

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

GARY AIRCRAFT CORPORATION,
Respondent.

DECREE

Before: Jones and Dyer, Circuit Judges, and Spears, District Judge.

BY THE COURT:

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the aforesaid Respondent on February 15, 1965. The Court heard argument of respective counsel on October 19, 1966, and considered the briefs and transcript of record filed in this cause. On November 8, 1966, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Gary Aircraft Corporation, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

ENTERED: NOVEMBER 30, 1966

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 22950

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus

GARY AIRCRAFT CORPORATION,

Respondent.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before JONES, and DYER, Circuit Judges, and SPEARS, District Judge.

BY THE COURT:

IT IS ORDERED that respondent's motion to file a late petition for rehearing in the above entitled and numbered cause is hereby granted, and the petition for rehearing be and the same is hereby denied.

(ORIGINAL FILED — JANUARY 4, 1967).

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended, are as follows:

"Sec. 2. (11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

"Sec. 8. (a) It shall be an unfair labor practice for an employer —

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this

Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . .

"Sec. 10 (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby

was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

* * *

"(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforc-

ing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28."